

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
DECEMBER 3, 2008 Session

**NANCY M. SEARLE v. METROPOLITAN GOVERNMENT OF
NASHVILLE AND DAVIDSON COUNTY, TENNESSEE**

**Direct Appeal from the Circuit Court for Davidson County
No. 06C-394 Amanda McClendon, Judge**

No. M2008-01085-COA-R3-CV - Filed March 20, 2009

In this appeal, we are asked to determine whether the Metropolitan Government of Nashville and Davidson County owed or breached a duty to Nancy M. Searle when a sheriff's deputy made a return of service indicating Ms. Searle had been served when, in fact, a warrant was simply left at Ms. Searle's place of employment. Additionally, we are asked to determine whether the deputy's representation that Ms. Searle had been served constituted a "constructive representation" such that Ms. Searle could recover under a fraud theory. Finally, we are asked to determine whether Ms. Searle suffered damages recoverable against the government. The order appealed did not adjudicate Ms. Searle's claims under the due process clause and Tennessee Code Annotated section 8-8-201. Thus, because the trial court did not adjudicate all of the claims raised below, the order on appeal is not final and it not appealable as of right. Therefore, we dismiss the appeal for lack of subject matter jurisdiction and remand for further proceedings.

**Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Dismissed and
Remanded**

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

Allen Barnes, Nashville, TN, for Appellant

Sue B. Cain, Director of Law, Philip D. Baltz, James E. Robinson, Nashville, TN, for Appellee

OPINION

Nancy M. Searle (“Appellant” or “Ms. Searle”) maintained a credit card account with Lowe’s Hardware Store (“Lowe’s”), whereby she purchased items on credit and was required to make a monthly minimum payment. In 2002 or 2003, Ms. Searle fell behind in making such minimum payments. On November 24, 2004, Monogram Credit Card Bank of Georgia (“Monogram”), acting as Lowe’s collection agency or agent, filed suit in the Davidson County General Sessions Court against Ms. Searle for \$5,499.46.

On December 15, 2004, Officer Ed Mikrut, a sheriff’s deputy, attempted to serve the general sessions warrant at Ms. Searle’s place of employment, Nashville General Hospital. However, according to Officer Mikrut, when he was informed that Ms. Searle would not return until the following day, he sealed the warrant inside an envelope marked with Ms. Searle’s name and the word “confidential.” He then asked the nurses at the sixth floor’s main desk to ensure that Ms. Searle received the “paperwork.” Someone took the envelope and placed it in what Officer Mikrut believed was Ms. Searle’s personal mailbox. Thereafter, Officer Mikrut made a return of service indicating that Ms. Searle was served on December 15, 2004.

Upon return of service, the case was set for trial on January 24, 2005. However, Ms. Searle did not appear at trial, and a default judgment for \$5,499.46 was entered against her. Ms. Searle claimed that she did not receive notice of the lawsuit until February 4, 2005, ten days after the default judgment was entered against her. Accordingly, the general sessions court entered an Agreed Order to Quash Garnishment, Return Funds to the Defendant and Set Aside Default Judgment on October 19, 2005.

On December 15, 2005, Ms. Searle filed, in the Davidson County Chancery Court, a Complaint against the “Sheriff for the Metropolitan Government of Nashville-Davidson County, Tennessee.” In her Complaint, Ms. Searle alleged, as a cause of action, “that the Sheriff’s Deputy made an erroneous and/or fraudulent return on the service of process.” On February 15, 2006, the chancery court entered an Agreed Order for a More Definite Statement and Removal of Case to Circuit Court, both transferring the case and requiring Ms. Searle to “file an amended complaint setting forth the person or entity in which she is suing and specifically stating a cause of action[.]” In her Amended Complaint, filed March 8, 2006, Ms. Searle added the “Metropolitan Government of Nashville-Davidson County, Tennessee” (“Government”) as a defendant.¹ However, she merely reiterated her original Complaint’s cause of action as “erroneous and/or fraudulent return on the service of process” and claimed the same damages listed in her original Complaint: a default judgment being entered against her; damage to her credit rating;² loss of several credit cards and

¹ On June 22, 2006, an Agreed Order Dismissing the Sheriff’s Department was entered.

² In her Responses to Defendant’s First Set of Interrogatories dated November of December 2006, Ms. Searle stated that no judgment or other disposition from this case was currently reflected on her credit report. However, in her Response to Defendant’s Motion for Summary Judgment, filed April 3, 2008, Ms. Searle stated that “a judgment is still
(continued...) ”

increased insurance premiums;³ mental distress from both the service of process and the garnishment of her wages;⁴ a judgment lien being placed on her real property;⁵ and the loss of use of her garnished wages for several months. In an Affidavit filed with her Response to Defendant's Motion for Summary Judgment, Ms. Searle also listed as damages, \$2,500 in attorneys' fees to regain her garnished wages and \$98.00 in unreturned garnished wages.⁶

On February 25, 2008, Appellee filed a Motion for Summary Judgment. In her Response to Defendant's Motion for Summary Judgment, Ms. Searle specifically stated that the Government owed and breached duties to her under "due process" and Tennessee Code Annotated sections 8-8-201 and 8-8-207. On April 11, 2008, a hearing was held on the Motion for Summary Judgment. At the hearing, Ms. Searle orally raised Tennessee Code Annotated section 8-8-302 as a basis for relief. The circuit court granted Appellee's Motion for Summary Judgment, and in its April 17, 2008 Order Granting Defendant's Motion for Summary Judgment, made the following findings:⁷

1. The Court finds that the Plaintiff is not a "person aggrieved" under Tenn. Code Ann. § 8-8-207, and, therefore the Defendant owes her no legal duty.

2. The Court finds that the Plaintiff cannot rely upon Tenn. Code Anno. § 8-8-302, cited in oral argument, since there is no allegation plead that the Defendant was acting by virtue of or under color of the Sheriff's office.

3. The Plaintiff has not established the elements of fraud, as Defendant's misrepresentation was not made to the Plaintiff.

It is from this Order which Ms. Searle now appeals.

²(...continued)
showing on her credit report" and an attached credit report of March 15, 2008 verified such.

³ Ms. Searle no longer claims that the loss of credit cards or increased insurance premiums resulted from the judgment rendered in this case.

⁴ At oral argument, Appellant conceded that her emotional distress claims were not actionable.

⁵ The judgment lien was released on January 10, 2006.

⁶ Although the general sessions court entered an Agreed Order to Quash Garnishment, Return Funds to the Defendant and Set Aside Default Judgment, and Ms. Searle acknowledges that portions of her garnished wages were returned in October and December of 2005, she maintains that \$98.00 was never returned.

⁷ The circuit court also entered an Order on April 23, 2008, granting Defendant summary judgment. The April 23, 2008 Order specifically dismissed Ms. Searle's due process claim, finding that she "failed to plead such constitutional violations in her complaint." However, in a September 30, 2008 Order, the circuit court designated the April 17, 2008 Order as the final order of the court. The April 17, 2008 Order does not address Ms. Searle's due process claim.

“This Court may *sua sponte* review the record on appeal to determine if we properly have jurisdiction.” *Waters v. Tenn. Dep’t of Corr.*, No. W2007-01397-COA-R3-CV, 2008 WL 4253897, at *3 (Tenn. Ct. App. Sept. 18, 2008) (quoting *Huntington Nat’l Bank v. Hooker*, 840 S.W.2d 916, 922 (Tenn. Ct. App. 1991)). After reviewing the record in this case, we find that the order entered by the trial court is not a final judgment over which this Court may properly exercise jurisdiction.

Tennessee Rule of Appellate Procedure 3(a) provides:

In civil actions every final judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Appeals is appealable as of right. Except as otherwise permitted in rule 9 and in Rule 54.02 Tennessee Rules of Civil Procedure, if multiple parties or multiple claims for relief are involved in an action, any order the adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before entry of a final judgment adjudicating all the claims, rights, and liabilities of all parties.

Tenn. R. App. P. 3(a) (2008).

“Thus, under this rule, if there are multiple parties or multiples claims in an action, any order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not final or appealable as of right.” *Waters*, 2008 WL 4253897, at *4. “Except where otherwise provided, the subject matter of this Court is limited to final orders.” *Id.* (citing *Bayberry Assocs. v. Jones*, 783 S.W.2d 553, 559 (Tenn. 1990)).

The order from which Ms. Searle appeals did not address the merits of her claims under the due process clause and Tennessee Code Annotated section 8-8-201. Because all of her claims have not been fully adjudicated, an appeal as of right is not available to Ms. Searle. This Court would have jurisdiction to hear this appeal only if permission to appeal had been granted or if the order appealed had been made final pursuant to Tennessee Rule of Civil Procedure 54.02. However, neither action has been taken in this case. Therefore, Ms. Searle has appealed an order that is not final, and we must dismiss the appeal and remand the matter to the trial court.

The appeal is dismissed and the case remanded to the trial court for further proceedings consistent with this Opinion. Costs of this appeal are taxed to Appellant, Nancy M. Searle, and her surety, for which execution may issue if necessary.

ALAN E. HIGHERS, P.J., W.S.